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M.L.W. F.Y.I.

July 6, 1990

Court of Appeals of the State of California
Second Appellate District
3580 Wilshire Boulevard, Room 301
Los Angeles CA 90010

re: **Civil Number B038975**
Superior Court No. C 420153

Dear Clerk:

This office is co-counsel for cross-appellant Bent Corydon in the above referred to appeal.

In the respondant and cross-appeal brief filed by this office and Toby Plevin, on behalf of Bent Corydon, on page 30, we refer to the "500 series (auto tapes)" which are subject of the cross-appeal. The trial court had refused to allow us to have said tapes as they were held subject to the attorney-client privilege pursuant to Zolin v. United States, 809 F.2d 1411. In our brief we pointed out that since the ruling, the United States Supreme Court subsequently rendered a decision remanding the same for hearing to determine the tapes' discoverability. United States v. Zolin, 109 S. Ct. 2619. In our brief we asked this court to remand the issue to the trial court with instructions to follow the guidelines stated by United States Supreme Court in Zolin.

Since the filing of our brief, the ninth circuit rendered a decision per the United States Supreme Court ruling, United States of America v. Zolin, 90 Daily Journal D.A.R. 6890, holding that the tapes are not subject to attorney-client privilege as "partial transcripts (of the tapes) demonstrate that the purpose of the MCCS project was to cover up past criminal wrongdoings. The MCCS project involved discussion and planning of future fraud against the IRS, in violation of 18 USC 371...the figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the United States government. The purpose of the crime-fraud exception is to exclude such transactions from protection of the attorney-client privilege."

We attach this recent decision to this letter so that it may become part of the justices' review.

Very Truly Yours,

Paul Morantz

PM:fml
enclosure

Willis, No. 89-30076, slip op. at 3221 (9th Cir. April 2, 1990) (" 'trafficking in narcotics is very often related to the carrying and use of firearms' ") (quoting *United States v. Ramos*, 861 F.2d 228, 231 n.3 (9th Cir. 1988)). Heldberg has failed to demonstrate that it is clearly improbable that the possession of a firearm is connected to the importation of a user's quantity of a controlled substance.

AFFIRMED.

ATTORNEYS

Privilege Doesn't Protect Tapes That Prove Attorney Was Retained to Promote Crime

Cite as 90 Daily Journal D.A.R. 6890

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Petitioner/Appellee/Cross-Appellant,

v.

FRANK S. ZOLIN,
Respondent/Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA and MARY SUE HUBBARD,
Intervenors/Appellants/Cross-Appellees.

Nos. 85-6065; 85-6105

D.C. No. CV 85-440-HLH

OPINION

On Remand from the United States Supreme Court

Filed June 20, 1990

Before: Alfred T. Goodwin, Chief Judge, James R. Browning and Jerome Farris, Circuit Judges.

Opinion by Judge Farris

COUNSEL

Gary R. Allen, Tax Division, Department of Justice, Washington, D.C., for the petitioner/appellee/cross-appellant.

Eric M. Lieberman, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, New York, New York, for the intervenors/appellants/cross-appellees.

Frederick Bennett, County Counsel, Los Angeles, California, for the respondent/appellee.

OPINION

FARRIS, Circuit Judge:

The facts of this case are set forth in our previous opinion, *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part and vacated in part*, 109 S.Ct. 2619 (1989). We now resolve whether tapes of two meetings of the Mission Corporate Category Sortout project are admissible under the crime-fraud exception to the attorney-client privilege in light of the Supreme Court's ruling in *United States v. Zolin*, 109 S.Ct. 2619 (1989). We hold that the tapes are admissible.[1]

"To invoke the [crime-fraud] exception successfully the party seeking disclosure . . . must make out a prima facie case that the attorney was retained in order to promote intended or continuing criminal or fraudulent activity." *United States v. Hodge & Zweig*, 548 F.2d 1347, 1353, 1354 (9th Cir. 1977). The Government has presented the following evidence of intended illegality: (1) Agent Petersell's Supplemental Declaration of March 8, 1985, (2) Petersell's Supplemental Declaration of March 15, 1985, and (3) partial transcripts of the tapes themselves.[1]

In our first *Zolin* opinion we examined only the independent evidence presented—items one and two above—and held that "while not altogether insubstantial, [this evidence] is not sufficient to make out the requisite prima facie showing of intended illegality." 809 F.2d at 1419. In its decision, the Supreme Court held that

> evidence that is not "independent" of the contents of allegedly privileged communications—like the partial transcripts in this case—may be used not only in the pursuit of *in camera* review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies.

Zolin, 109 S.Ct. at 2632 n.12. We must therefore examine the transcripts and determine whether they, along with the independent evidence already reviewed, demonstrate sufficient evidence of intended illegality to establish that the tapes are within the crime-fraud exception. We hold that they do.

The partial transcripts demonstrate that the purpose of the MCCS project was to cover up past criminal wrong-doing. The MCCS project involved the discussion and planning for future frauds against the IRS, in violation of 18 U.S.C. § 371. *See, e.g., United States v. Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984). The figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the U.S. Government. The purpose of the crime-fraud exception is to exclude such transactions from the protection of the attorney-client privilege.

We therefore reject the district court's holding that the Government did not make out a case of intended illegality. In light of the Supreme Court's holding that the tapes themselves can be examined for proof that would establish the crime-fraud exception, the transcripts can be examined, and they appear to make out the Government's case on intended illegality. On remand the district court should admit the MCCS tapes into evidence, subject to any objections the parties might make at that time.[2]

REVERSED AND REMANDED.

[2]The issue of the potential illegality of the transcripts, mentioned by the Supreme Court, *see Zolin*, 109 S.Ct. at 2624 n.5, is not properly before this court. The Church did not raise this issue in its original appeal, and we will not consider it on a later remand. *See Nilsson, Robbins, et al. v. Louisiana Hydroelec.*, 854 F.2d 1538, 1547-48 (9th Cir. 1988).

[1]The Government has also attempted to present the declaration of Agent Philip Xanthos as evidence, but we have already denied the Government permission to present this declaration and will not consider it here. *See* March 3, 1987 Order.

PROOF OF SERVICE BY MAIL

I am a resident of Los Angeles County, am over the age of eighteen, and not a party to the herein address. My business address is P.O. Box 511, Pacific Palisades, California 90272.

On 7/6 1990, I served the within on the parties by placing a copy of the same in a sealed envelope with postage thereon and placed the same in the United States mail at Pacific Palisades address as follows:

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I declare that the above is true under the penalty of perjury. Executed on 7/6/90, at Pacific Palisades, California.

Felicia Lansbury

FELICIA LANSBURY